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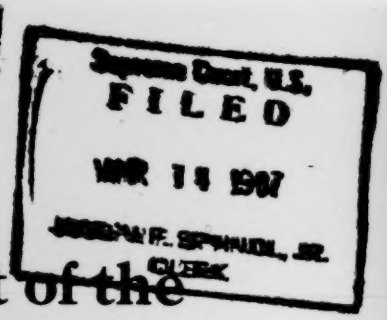

No. _____

In the Supreme Court of the United States

October Term, 1986

DAVID HANKINS,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Supremacy Clause provide a federal officer with immunity from state criminal prosecution for wrongful acts performed in the line of duty absent a finding of malice or criminal intent?

2. Was petitioner denied the effective assistance of counsel because his trial attorney failed to raise the federal immunity defense?

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PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

David Hankins, by and through his attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, dated January 13, 1987, affirming petitioner's combined appeal of his conviction and the denial of his 28 U.S.C. 2255 motion.

OPINIONS BELOW

The unreported decision of the District Court denying the 28 U.S.C. 2255 motion is reprinted in the appendix

hereto, pp. 1-18. The unpublished memorandum of the Ninth Circuit remanding the consolidated appeal to the district court is reprinted in the appendix, pp. 19-34. The oral findings of the district court on remand are reprinted in the appendix, pp. 35-39. The unreported findings of fact and conclusions of law of the district court on remand are reprinted in the appendix, pp. 40-55. The unpublished memorandum of the Ninth Circuit denying the appeal is reprinted in the appendix, pp. 56-57.

JURISDICTION

Petitioner was charged in Ventura County Municipal Court with two state offenses. The case was removed to The United States District Court for the Central District of California from the Ventura County Municipal Court pursuant to 28 U.S.C. 1442(a)(1). The final order of the Ninth Circuit denying petitioner's consolidated appeals was filed on January 13, 1987. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1) and Rule 20.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Article VI, Clause 2, the Supremacy Clause (see appendix, p. 58).

California Penal Code §417(a)(2) provides in relevant part: Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner is guilty of a misdemeanor.

STATEMENT OF THE CASE

Petitioner Hankins was a federal Border Patrol agent for the Immigration and Naturalization Service. He was charged by the State of California with the misdemeanor of illegally brandishing his weapon as a result of actions he took while he was on duty enforcing the federal immigration law. He was convicted. This petition raises the issue of when a federal law enforcement officer is immune from state criminal prosecution for actions occurring in the performance of his duties.

1. Facts.

In October, 1981, Hankins and a fellow agent were on duty in a marked Border Patrol vehicle. They observed a car which appeared to contain illegal aliens. They had probable cause to stop the aliens to interrogate them regarding their right to be in the United States (Reporter's Transcript ["R.T."], 286-287). The agents chased the car, traveling at high speeds for five miles on a two-lane highway (R.T., 73, 75, 194-196; Statement of Facts, Appendix, pp. 4-5). Both agents felt their lives and the lives of others were in danger (R.T., 85-86, 197-198).

Petitioner fired a warning shot in an attempt to scare the driver of the car into pulling over (R.T., 213). The Border Patrol Handbook provides that firearms are to be employed only in self-defense or in the defense of others (Appendix, pp. 44-45).

The car continued to flee, and petitioner fired a second shot that disabled the car. The occupants abandoned the car and escaped (R.T., 199-201).

Petitioner was informed by his supervisor that he had violated Border Patrol policy because the use of a weapon is permitted only in self-defense or in defense of others

(R.T., 101, 218). Petitioner replied that he had used his gun because he was concerned for the safety of other motorists (R.T., 228-229). His supervisor said it should not happen again (R.T., 100-102).

Petitioner and the same supervisor were involved in another high-speed chase while on duty about seven months later. They chased a car containing suspected illegal aliens for over four miles on a freeway (R.T., 104-106, 205-206). They had probable cause to stop and interrogate the passengers (R.T., 286-287). Petitioner drew his gun and fired a shot which broke a window of the fleeing car (R.T., 107-108, 206-207). The car stopped, and petitioner arrested two passengers. Two other passengers escaped (R.T., 108-109). Petitioner again claimed that he drew his weapon out of concern for the safety of others (R.T., 222).

2. The State Criminal Charges

The petitioner was charged in Ventura County Municipal Court with two misdemeanor violations of Section 417(a) of the California Penal Code, which prohibits the exhibition of a weapon in a threatening manner. He pled not guilty.

The case was removed to the federal district court on petitioner's motion.

Petitioner's trial counsel never raised the immunity defense in either a pretrial motion to dismiss or as a defense at trial. Instead, the issue at trial was the reasonableness of petitioner's conduct.

Petitioner testified that he thought his actions were sanctioned by Border Patrol policy because he was concerned for the safety of others (R.T., 197-198, 216).

Defense counsel argued that petitioner should be acquitted because it was not unreasonable for him to draw his weapon under the circumstances of a high-speed chase (R.T., 262, 264, 266-267, 270-271).

The deputy district attorney argued that petitioner's actions were not reasonable because they violated Border Patrol policy and there was no imminent danger to anyone else (R.T., 253-260, 273). The prosecutor claimed that a federal officer, like any other civilian, violates state law when he draws his weapon and is not acting in self-defense or the defense of others (R.T., 272-273).

The jury was instructed that the question to be decided was whether the petitioner "acted improperly" under the circumstances. They were instructed to convict the petitioner if they found he acted improperly in drawing his weapon but to acquit him if they concluded his actions were justified (R.T., 287).

The jury failed to reach a verdict on Count I and found petitioner guilty of Count II. Petitioner was sentenced to six months imprisonment with execution of five months suspended. He was fired from the Border Patrol.

3. The Appeals

Petitioner retained new counsel and filed timely Notice of Appeal. Petitioner then filed a motion to vacate the conviction pursuant to 28 U.S.C. §2255. Petitioner raised the federal immunity defense for the first time and claimed he was immune to state prosecution because the Supremacy Clause shields federal officers from state criminal proceedings arising out of the performance of their duties. Petitioner also argued that he received ineffective assistance of counsel because his trial lawyer failed to raise the immunity defense.

The District Court, relying primarily on *Clifton v. Cox,* 549 F.2d 722 (9th Cir. 1977), denied the 28 U.S.C. §2255 petition. The court held that petitioner acted outside his scope of authority by drawing, brandishing and firing his gun. It found petitioner's actions unnecessary, dangerous and in violation of Border Patrol policy (Appendix, pp. 12-18). The court did not make a finding of wantonness, but merely held that there was a "suggestion . . . of malice" in petitioner's conduct. The court concluded that petitioner could not reasonably have believed that drawing and firing his weapon were necessary and proper or justified under the circumstances (Appendix, pp. 16-18).

The Ninth Circuit consolidated the direct appeal (C.A. 83-5061) and the appeal from the denial of the 2255 motion (C.A. 84-6255) and then remanded the case to the District Court for an evidentiary hearing on the immunity defense and the competency of trial counsel (Appendix, pp. 19-34).

At the evidentiary hearing, trial counsel testified he did not raise the immunity defense in a pretrial motion or at trial because he ". . . figured the federal immunity defense wasn't really what this case was about." (Reporter's Transcript of Evidentiary Hearing, January 13, 1986 [hereinafter "E.H."], 17). Counsel believed the case was about right and wrong and the reasonableness of petitioner's actions. "Either he did something right, or he did something wrong" (E.H., 17).

The District Court ruled after the evidentiary hearing that petitioner was not immune from state criminal prosecution and that he had not been denied effective assistance ~~of counsel~~ (E.H. 41-44 [Appendix, pp. 35-39]; Findings of Facts and Conclusions of Law [Appendix, pp. 40-55]). Petitioner appealed (C.A. 86-

5718). The Ninth Circuit affirmed [Appendix, pp. 56-57).

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S "OBJECTIVE REASONABLENESS" TEST THREATENS TO DESTROY IMMUNITY FOR FEDERAL OFFICERS WHO MAKE MISTAKES OR ERRORS IN JUDGMENT DURING THE PERFORMANCE OF THEIR OFFICIAL DUTIES.

A. Introduction

The Supreme Court should hear this case because the Ninth Circuit has dramatically increased the exposure of federal law enforcement officers to state criminal prosecution for conduct occurring in the line of duty. The Ninth Circuit has departed from traditional federal immunity standards by confusing the distinction between civil and criminal liability. As a result, a federal Border Patrol agent was charged by the State of California, convicted, and sentenced to county jail because he brandished his weapon while involved in a high-speed chase of suspected illegal aliens whom he had probable cause to stop.

The Supremacy Clause has long provided federal officers with immunity from state criminal prosecution for acts occurring in the performance of their offical duties. *In Re Neagle,* 135 U.S. 1, 75 (1890). Courts evaluating immunity claims have consistently inquired whether the officer possessed the *mens rea* generally required to impose criminal liability. Even if his acts were improper, a federal officer was immune from state prosecution as long as he did not act wantonly or with

criminal intent. *In Re Lewis*, 83 F. 159, 160 (C.C.D. Wash. 1897); *In Re Fair*, 100 F. 149, 155 (C.C.D. Neb. 1900).

However, the Ninth Circuit, in *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977), altered the federal immunity doctrine by confusing the traditional *mens rea* inquiry with an "objective reasonableness" test. The court collapsed the distinction between wanton conduct and mere negligence. Its decision leaves the door open to state prosecution of federal officers for errors in judgment that fall short of criminal intent or wantonness.

Although petitioner would have been shielded from state prosecution under the *Neagle* standard, he was denied immunity because the lower courts applied *Clifton's* objective reasonableness test.

This Court should grant certiorari to clarify the law of federal immunity and to determine if the Ninth Circuit properly introduced negligence to the immunity inquiry.

B. The Development of Federal Immunity Under the Supremacy Clause

In 1890, this Court first held that the Supremacy Clause provides a federal law enforcement officer with immunity from state criminal charges for conduct arising out of the performance of his duties. *In Re Neagle*, 135 U.S. 1, 75 (1890). The Court held that a federal officer cannot be guilty of a state crime if he acted within the scope of his authority and the act was necessary and proper under the circumstances. *Id.*

Neagle was a United States Marshall assigned to protect a Supreme Court Justice. Neagle shot and killed a man who attacked the Justice. He was charged with

murder in state court. Neagle's federal habeas petition claiming immunity was granted. The state appealed.

The Court in *Neagle* affirmed and found that the federal officer was immune from state criminal prosecution for killing the attacker because of his subjective belief that his actions were a necessary and proper part of his duty. *Id.* at 76.

Aside from laying the foundation for the federal immunity standard in *Neagle*, this Court has provided little specific guidance about which acts are necessary and proper.[1] However, early cases interpreting *Neagle* made clear that a federal officer is immune from state criminal prosecution for actions occurring in the line of duty if he lacks criminal intent or wantonness.

The court in *In Re Lewis*, 83 F. 159 (C.C.D. Wash. 1897), made a *mens rea* inquiry and held that a court considering an immunity application should determine "whether the officers acted wantonly and with criminal intent, or whether, in so far as their acts may be regarded as wrongful, they were mere errors of judgment."[2] *Id.* at 160.

The court found that an officer cannot be punished as a criminal for wrongful acts, errors or mistakes even

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[1] *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 8 (1906), the only other Supreme Court case addressing federal immunity, did not discuss the "necessary and proper" standard. The Court held that discharge from state custody prior to trial should be avoided where an evidentiary dispute exists. *Drury* is not helpful here because petitioner did not raise the immunity issue until after the trial was completed and the facts were established.

[2] Words used by judges to describe the *mens rea* necessary for common law crimes include "maliciously", "feloniously" and "with intent to . . ." W. LA FAVE & A. SCOTT, 1 SUBSTANTIVE CRIMINAL LAW §3.4(a) (1986).

if he invades the rights of individuals from an excess of zeal or a lack of judgment. Instead, he is liable to the government under whose appointment he is acting or to a civil action by the individual he has wronged. The court concluded that it would be intolerable if state goverments could use their criminal laws to discipline United States officers for the manner in which they discharge their duties. *Id.*

Three years later, the court in *In re Fair*, 100 F. 149, 155 (C.C.D. Neb. 1900), similarly declared that a federal officer is not liable to state criminal prosecution if he acted without criminal intent and simply made an error of judgment. *Accord United States v. Lipsett ex parte Gillette*, 156 F. 65, 71 (C.C.W.D. Mich. 1907) (the court must decide "whether the guard was acting wantonly, . . ., or otherwise stated, whether it was believed by him at the time to be reasonably necessary to shoot.").

Subsequent cases consistently focused on the subjective beliefs of the federal officer. The courts inquired whether the officer had the *mens rea* generally required to establish criminal liability. As long as the officer honestly believed that it was reasonably necessary to act as he did, he lacked the criminal intent or malice that would defeat his claim of immunity.

Although many of these cases introduced broad notions of "reasonableness" into the analysis, the inquiry remained limited to the officer's honest belief. *See, e.g., Birsch v. Tumbleson*, 31 F.2d 811, 814 (4th Cir. 1929) (immunity turns upon determination "that what [the officers] did was necessary, or at least believed by them to be necessary to properly discharge their duties, or for their own protection"); *Brown v. Cain*, 56 F.Supp. 56, 58 (E.D.Pa. 1944) ("The inquiry must, therefore, be as to the honesty of the [officer's] belief that the

arrest was justified and that the shooting was reasonably necessary to accomplish it."); *In re McShane*, 235 F.Supp. 262, 274 (N.D. Miss. 1964) ("If petitioner shows . . . that he had an honest and reasonable belief that what he did was necessary in the performance of his duty . . . then he is entitled to the relief he seeks.").

It is thus clear that a continuous but uneven line of cases since *Neagle* hold that errors in judgment do not deprive an offficer of immunity if he acted without criminal intent or in the honest belief that his conduct was necessary. The inquiry has never focused upon the objective reasonableness of the officer's acts. Only a finding of subjective fault defeats an otherwise valid claim of federal immunity.

C. Federal Immunity in the Ninth Circuit

In *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977), the Ninth Circuit diluted the immunity defense by adding an "objective reasonableness" requirement to the traditional *Neagle* standard. A federal officer seeking immunity in the Ninth Circuit must now demonstrate not only the absence of criminal intent or wantonness but the objective reasonableness of his acts. Consequently, an officer who uses poor judgment or an excess of zeal, without criminal intent, is not immune from state liability.

The court in *Clifton,* relying on its own interpretation of the *Neagle* standard, announced a two-pronged test to determine whether immunity shields a federal officer from state criminal prosecution. *Clifton*, 549 F.2d at 726, 728.

Under the first prong, the court examined whether the officer was acting within the scope of his authority. The court held that an officer continues to act under authority of federal law even if he exceeds his express authority. Errors of judgment alone in what the officer conceives to be his legal duty will not defeat the immunity claim. *Id.* at 727-728.

The second prong of the Ninth Circuit's immunity test introduced an objective requirement into the evaluation of an immunity claim. The court held that the determination of whether the officer's act was necessary and proper ". . . must rest not only on the subjective belief of the officer but also on the *objective finding that his conduct may be said to be reasonable* under the existing circumstances." (Emphasis added.) *Id.* at 728.

Thus, the Ninth Circuit added an objective reasonableness component to the *Neagle* subjective fault test. Under *Clifton*, a federal officer claiming immunity must now demonstrate not only that he subjectively believed his conduct was necessary but also that his conduct was objectively reasonable.

D. The Consequences of The Ninth Circuit Test Of Objective Reasonableness

The consequences of the Ninth Circuit's objective reasonableness test are enormous. First, the court departed from the traditional criminal intent/wantonness standard and established a rule that imposes criminal liability based upon an ordinary negligence standard. The Ninth Circuit has once again " . . . effectively collapsed the distinction between mere negligence and wanton conduct . . ." *Whitely v. Albers*, ___ U.S. ___, 106 S.Ct. 1078, 1086 (1986) (O'Connor,

J.) (reversing the Ninth Circuit in an Eighth Amendment claim). By creating a confusing standard requiring both civil and criminal fault, the application of the immunity doctrine has been significantly altered.

Second, the Ninth Circuit has created confusion in the circuits with its concept of objective reasonableness. By blurring the distinctions between subjective and objective reasonableness in the criminal context, the Ninth Circuit's new test creates a completely different standard for evaluating an immunity claim. Although other courts cite *Clifton v. Cox* approvingly, they have not adopted the objective reasonableness prong in their immunity analysis. *E.g., Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982) (federal agent reasonably believed his actions to be necessary and proper); *State of Conn. v. Marra,* 528 F.Supp. 381, 387 (D.Conn. 1981) (petitioner need only show that he reasonably thought his acts were necessary and justifiable); *United States v. Payner,* 434 F. Supp. 113, 134 n.75 (N.D. Ohio 1977) (interpreting *Clifton v. Cox* as providing a broad basis for immunity if an officer can show a subjective belief that his conduct was necessary and proper under the circumstances, "regardless of how flagrantly their actions violate a state's criminal laws.").

Third, it is now easier for a state to prosecute a federal officer for conduct occurring in the line of duty and more difficult for a federal officer to establish immunity. Under *Clifton,* the conduct of federal officers performing official duties will be evaluated under an ordinary negligence standard. Honest mistakes, errors of judgment and split-second decisions may all be second-guessed by state criminal authorities. A federal officer will not qualify for immunity where his acts are objectively "unreasonable" even if he lacks criminal

intent. Federal police officers will be hampered by their increased exposure to state criminal prosecution for a wide range of conduct for which they should be immune.

Finally, the threat to federal law enforcement inherent in the *Clifton* objective reasonableness test was realized in this case. Petitioner was charged by the State of California, convicted and sentenced to county jail for conduct occurring in the line of duty.

The issue at petitioner's trial was the propriety of his conduct, not his state of mind. The court instructed the jury that the question to be decided was whether the petitioner "acted improperly" under the circumstances; the jury was not required to make a finding of criminal intent or maliciousness.

This is precisely the type of case where federal immunity should attach. An overzealous federal officer, acting without malice or criminal intent, made an error in judgment and brandished his weapon in an attempt to enforce the federal immigration law. If his actions were wrongful, either a civil suit or Border Patrol discipline were available as a sanction. He should have been immune to state criminal prosection.

If this conviction and the Ninth Circuit's immunity standard are allowed to stand, federal officers will be subject to the burden of state criminal prosecution for any conduct that any state prosecutor thinks is wrong. The conviction should be reversed.

II.

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO RAISE THE FEDERAL IMMUNITY DEFENSE.

To establish ineffective assistance of counsel, a party must show (1) that the counsel's errors or omissions reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent attorney, and (2) that there is a reasonable probability that but for counsel's errors or omissions the jury's verdict would have been different. *Strickland v. Washington,* ___ U.S. ___, 104 S.Ct. 2052, 2064-2065 (1984).

The Ninth Circuit found that petitioner's trial counsel did not present evidence, request instructions, or argue to the jury that his client was entitled to federal immunity. The District Court found on remand that trial counsel made a tactical mistake that backfired and that the error was not prejudicial because there was no reasonable probability that raising the immunity defense would have brought about any greater likelihood of another result. On appeal, the Ninth Circuit found support in the record for the district court's decision.

The Ninth Circuit erred because there is a reasonable probability in the instant case that trial counsel's failure to present the immunity defense affected the outcome of the trial. The immunity defense would have changed the whole theory and presentation of the defense. The issue at trial would have been petitioner's criminal intent, not the correctness of his acts. Instead of arguing that defendant had acted correctly, defense counsel need only have shown that defendant lacked criminal intent. In order to convict, the jury instructions would have

required the jury to determine whether petitioner's conduct was malicious.

Certiorari should be granted to clarify how a defendant claiming ineffective assistance of counsel can demonstrate a reasonable probability that his lawyer's mistakes undermine confidence in the verdict.

CONCLUSION

This Court should grant certiorari to clarify the law of federal immunity and to determine if the Ninth Circuit properly introduced negligence to the immunity inquiry. This Court should find that petitioner was immune to state criminal prosecution and that he received ineffective assistance of counsel. His conviction should be reversed. In the alternative, petitioner should be granted a new trial to determine whether he acted with criminal intent.

Respectfully submitted,

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WAYNE R. YOUNG

Attorneys for Petitioner
DAVID HANKINS

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, vs. DAVID R. HANKINS, Defendant-Petitioner.	No. CV 83-3613-DWW No. CR 82-967-DWW

The defendant was charged in a case entitled People of the State of California, plaintiff, v. David R. Hankins, Defendant, (CR-82-967-DWW) with a misdemeanor violation of Section 417(a) of the California Penal Code which makes it an offense, except in self defense, in the

presence of any other person, to draw or exhibit a firearm, whether loaded or unloaded, or any other deadly weapon, in a rude, angry or threatening manner. Originally filed in the Municipal Court of Ventura County, the case was transferred to the United States District Court for the Central District of California pursuant to the provision of 28 USC 1442(a)(1) and because the defendant was a federal officer, to wit, a Border Patrol officer. A jury convicted the defendant of count 2, but acquitted him on count 1 upon the ground that the alleged violation was barred by the Statute of Limitations. Defendant has been sentenced on the charge and an appeal is pending.

During the pendency of the appeal the defendant has changed attorneys and now brings this motion under 28 USC § 2255 to

vacate an allegedly illegal sentence upon the ground that (1) as a federal officer, defendant was immune from state prosecution because of the Supremacy Clause--Article VI of United States Constitution, and (2) defendant was denied the effective assistance of counsel at his trial because his counsel failed to raise at the time of trial the defense of immunity as just set forth hereinbefore. The Court ordered a response to be filed by the prosecution and thereafter a reply to the prosecutions' response was filed by Hankins. The Court deems no hearing necessary on the points raised inasmuch as they turn on questions of law and I will reach a decision in this matter only on the first issue raised (immunity) because I feel that any consideration of the issue of

ineffective aid of counsel should be raised on the direct appeal.

A brief recitation of the facts is necessary. Hankins worked as a Border Patrol agent for the Immigration and Naturalization Service for five years. At the time of the occurrences involved herein he was stationed in Ventura county. His duties included locating illegal aliens through traffic observation, city patrol, ranch and job checks. The offense charged in count 1 (which the jury acquitted defendant because it was time barred) occurred in October 1981. Hankins and a fellow officer were traveling in a marked Border Patrol vehicle that was equipped with lights and siren when they noticed an older model automobile carrying several passengers who were Mexican-appearing. They gave chase to the auto-

mobile which accelerated when it was discovered that the officers were in pursuit and the chase continued for four or five miles during which two uninvolved motorists were forced off the road and both the pursuing and the pursued car reached speeds of 100 miles per hour. At one point in time Hankins held his gun in the air and fired one round in an attempt to frighten the driver of the other car into pulling over. The car continued to flee and made a sudden, skidding right turn onto a small side road. The agents were traveling too fast to make the turn but they braked to a stop some distance beyond the fleeing car. As they passed the small side street Hankins used his gun once again and aimed it at the left rear tire of the pursued car and hit the gas tank. The passengers of the car abandoned

it and fled into a nearby orchard and were not captured. No official report was made by Hankins to the Immigration and Naturalization Service of this shooting but Hankins made an informal explanation of it to his supervisor, Agent Jensen, who bawled Hankins out about the accident and reminded him that he was not to fire his weapon except in self-defense or in defense of a fellow officer and that this conduct was not to happen again.

Seven months later on June 8, 1982 the events constituting count 2 occurred and this is the situation for which Hankins was convicted. This time, Hankins was accompanied by Agent Jensen, his supervisor, and once again they noticed a vehicle approaching the freeway with four passengers who looked like they might be illegal aliens. Hankins and his partner

were traveling in a marked Border Patrol car with lights and siren. They began pursuit of the automobile which had reached the freeway and traveled behind the car in the left lane. As they approached the automobile it moved to the right lane and then to the right shoulder as if it was looking for a place to park. Jensen pulled alongside the vehicle and by using his P.A. system told the driver to pull over. Hankins leaned out of the passenger window holding his pistol with both hands. He fired a shot which broke the drivers side window of the other automobile and caused shattered glass to slightly injure the driver. Two of the passengers fled but the driver and one passenger remained. The driver turned out to be a lawfully admitted resident alien, but the remaining passenger was an undocu-

mented alien. Hankins claimed at trial that his firing of the shot at the pursued vehicle was accidential but his explanation of this was not persuasive and for the purposes of this decision, I find that he intended to fire his weapon.

Hankins relies heavily upon the holding in Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977), in support of his contention that as a federal officer, allegedly acting within the scope of his authority, he was immune from state prosecution. In Clifton a task force from various federal and state agencies holding a federal search warrant authorizing a search of a ranch near Gaberville, California were seeking to arrest one Dickenson for illegal drug manufacturing. He was one of the record owners of the ranch. The raiding party, including

Clifton, a DEA agent, reached the ranch by the use of an army helicopter which landed in front of a cabin and raised considerable dust and debris and caused quite a lot of noise. As the officers debarked, one Agent Filben, outran his feet and fell to the ground. Clifton, thinking that Filben had been shot, rushed the cabin and kicked in the door without knocking or otherwise identifying himself as an officer or indicating that he held a warrant. Dickenson, whom the warrant named, immediately fled out the back door and ran toward a nearby wooded area. Clifton pointed his gun at Dickenson and called "Halt" twice and then fired, the bullet entering Dickenson's back and killing him. It was later found that he was unarmed and he had offered no physical resistance other than flight. Clifton was

charged in state court with second degree murder and involuntary manslaughter. He petitioned the federal district court for a writ of habeas corpus and release from state custody upon the ground that as a federal official, engaged in the duties of his office, he was immune from state prosecution.

The Federal District Court found that petitioner honestly and reasonably believed: (1) the fleeing suspect was Dirk Dickenson, the individual named in the arrest warrant for violation of federal drug laws; (2) the fleeing suspect had just shot a fellow officer (Agent Filben); (3) the fleeing suspect was potentially armed and dangerous and that if he made his successful entry into the woods he would pose a danger to the lives of the pursuing officers.

Clifton used a two-pronged test to determine whether the immunity defense applied. The first question was whether the officer was acting within the scope of his authority, and the second question was whether the officers conduct was necessary and proper under the circumstances. The Clifton court found that Clifton was a fully appointed Federal Narcotics Agent empowered to carry firerarms and to execute search warrants and that even if his acts exceeded his express authority, they were within the scope of the authority accorded him under federal law. The court further found that in considering the second prong, the question was whether the officer subjectively believed his conduct was reasonable under the circumstances and whether it was objectively reasonable for him to so believe. The

Court held that under the facts of that case, Agent Clifton met the first prong because he was a DEA agent armed with a warrant and that he met the second prong because he reasonably believed his fellow agent had been shot by someone inside the cabin; that the person inside the cabin was armed and dangerous; that exigent circumstances existed to justify a hurried break-in of the cabin before other officers could be shot; and that firing at the fleeing suspect was a reasonable act since Clifton had grounds to believe he was armed and was headed for the woods where an even more dangerous situation was posed for any officers who would pursue him. The writ was granted.

Applying the two pronged test of Clifton to the present case, it is conceded that Hankins was a federal

officer who was going about his official duties at the time of the events constituting the offense in count 2 but it is highly questionable whether there is support for a finding that he was acting within the scope of his authority in firing the shot that pierced the window of the pursued automobile. The Border Patrol Handbook clearly states (Chapter 17-11) that the agency does not sanction shooting in arresting or preventing the escape of an alien or a smuggler of aliens. It further emphasizes that firearms should be employed only in self-defense, in defense of another officer or in the defense of an innocent third party.

Chapter 24-3 admonishes the officers to (a) never draw a gun except for a definite purpose (i.e., to use it) and to never cock the gun or place your finger on

the trigger unless you intend to shoot. It further admonishes the officer never to point a weapon at anyone unless he intends to shoot. Chapter 24-22 warns the officer never to fire a shot into the air or alongside an alien or other person who is attempting to escape. It flatly forbids the firing of warning shots.

This Court finds that Hankins was acting outside the authority given him as a federal officer by drawing his pistol and by brandishing it outside the window of his car and by firing it at the car that was being pursued. His willingness to take this drastic step, which could have cost the life of one or more of the passengers in the other automobile, is demonstrated by the fact that he followed the same breach of rules in October 1981 when he fired several shots at a fleeing

automobile allegedly containing undocumented aliens (count 1) and when he again pulled his gun and brandished it at a fleeing automobile on June 8, 1982 (count 2) while in the company of Jensen, his Supervisor, who had warned him earlier of the conduct in October 1981. As a matter of fact, there is even the suggestion that in both these instances Hankins acted out of malice in his zealousness to rid his area of undocumented aliens.

It should further be noted that on June 8, 1982 Hankins had no definite knowledge that the passengers he saw in the target car were illegal aliens; he depended solely upon the fact that they appeared to be Mexicans and acted as though they were uncomfortable in the presence of officers in a marked Border Patrol vehicle. It is important to note

that the automobile occupied by the Mexican-appearing passengers was hundreds of miles from a point of border entry and that the crime being investigated by Hankins (illegal presence in the United States) was a misdemeanor. His conduct of shotting at the automobile was clearly unnecessary, was ilkely to bring death or injury to persons who were not violating the law, and was in violation of every handbook provision of the agency that addressed itself to the proper use of guns by an officer.

The next question to be considered is whether Hankins reasonably believed his acts were necessary and proper under the circumstances. Once again, I call attention to the fact that the automobile that Jensen and Hankins pursued was traveling lawfully on a city street in

Ventura County and that the only thing that brought it under the suspicion of the officers was that it contained Mexican-appearing passengers. It should also be remembered that a large part of the population of Ventura are Mexicans and there is nothing unusual or suspicious about seeing a group of them riding in an automobile. There is nothing in the evidence to jusityf a belief that the automobile after entering the freeway was driving dangerously or that it was making a deliberate effort to evade being stopped. There is room for the belief that the car was actually trying to stop at a time when its driver was first alerted to the presence of the Patrol Guard and that it was in pursuit of him. Under all these circumstances, I cannot conclude that Hankins reasonably believed his acts were

necessary and proper or that there was any justification for him to draw his weapon and/or to fire it at persons in a vehicle that well could have been legally within the United States.

Plaintiff's defense on Clifton v. Cox finds no support under the facts of this case and I conclude that this court had jurisdiction to try the case and to impose sentence upon conviction on count 2.

The motion is Denied.

DATED: This 14 day of October, 1983.

David W. Williams

DAVID W. WILLIAMS
Senior United States District Judge

Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	Nos. 83-5061 and 84-6255
and	D.C. Nos. CR 82-967-TJH and CV 83-3613-DWW
PEOPLE OF THE STATE OF CALIFORNIA	
Plaintiffs-Appellees,	**MEMORANDUM***
vs.	
DAVID R. HANKINS,	
Defendant-Appellant.	

Appeal from
the United States District Court
for the Central District of California
Hon. Terry J. Hatter,
District Judge, Presiding
Hon. David W. Williams,
District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit xcept as provided by 9th Cir. R. 21.

Argued March 6, 1984-Los Angeles, California in 83-5061
Submitted April 24, 1985

Before: FARRIS and ALARCON, Circuit Judges, and COPPLE,* District Judge.

In this consolidated appeal Hankins seeks reversal of the judgment of conviction entered following trial by jury and the denial of his motion to vacate the conviction filed pursuant to 28 U.S.C. § 2255.

I

ISSUES RAISED ON DIRECT APPEAL

A. Failure to Dismiss Count One

Hankins argues that the district court erred in failing to dismiss Count I on the basis that it was barred by the statute of limitations. We disagree.

** Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

In Count I it is alleged that the crime was committed sometime in November, 1981. The complaint was filed on October 15, 1982. The statute of limitations for misdemeanors in California is one year. Cal. Penal Code § 801.[1] Hankins made a pretrial motion to dismiss on the ground that the government's witnesses would testify that the crime occurred either in October or November of 1981. The pretrial motion was denied. The district court ruled that the issue should not be decided until after the evidence concerning the date of the offense was introduced at trial. The motion was renewed at the close of the government's case. The district court denied the motion after ruling that the issue was a fact question which must be decided by the jury. The court dismissed Count I after the jury was

unable to reach a verdict. Agent Jensen testified that the incident occurred in November, 1981. This evidence was sufficient to show that the crime occurred within one year of the commission of the crime. The district court did not err in denying the motion to dismiss Count I.

Hankins' reliance on People v. Zamora, 18 Cal. 3d 538, 557 P.2d 75, 134 Cal. Rptr. 784 (1976) is misplaced. In Zamora, the California Supreme Court noted that if the People prevail on a pretrial motion to dismiss where it was alleged that the action was barred by the statute of limitations, "the limitation issue must still be resolved by the jury if it remains disputed by the defendant." Id. at 563 n.25, 557 P.2d at 92 n.25, 134 Cal. Rptr. at 801 n.25. That is precisely the

procedure followed by the district court in this matter.

B. Ineffectiveness of Counsel

Hankins asserts that he was ineffectively represented by this trial counsel because of his failure to raise the defenses of federal officer immunity to state prosecution and the "peace officer defense" pursuant to section 835(a) of the California Penal Code. These defenses were not presented at trial.

To establish ineffective assistance of counsel, a party must show (1) that the counsel's errors or omissions reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent attorney, and (2) that there is a reasonable probability that but for counsel's errors or omissions, the jury's

verdict would have been different. Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 2064-65 (1984); United States v. Schaflander, 743 F.2d 714, 717-18 (9th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1772 (1985). Hankins has failed to demonstrate from the record on his direct appeal that the presentation of these defenses would have resulted in a different verdict. Thus under Strickland, we are compelled to reject this contention as presented in Hankin's appeal from the judgment of conviction.

C. The Immunity Defense

Hankins also contends on the appeal from the judgment of conviction that he was immune from prosecution. This issue was not raised below. This question presents factual issues which should have been resolved in the district court. We

do not consider issues raised for the first time on a direct appeal which require the development of a factual record and a resolution of disputed question of fact. People of the Territory of Guam v. Okada, 694 F.2d 565, 570 n.8 (9th Cir. 1982), cert. denied, 105 S. Ct. 441 (1984).

II

ISSUES RAISED ON THE APPEAL FROM THE DENIAL OF THE MOTION TO VACATE THE CONVICTION

A. Ineffectiveness Of Counsel

In his motion to vacate the sentence pursuant to 28 U.S.C. § 2255, Hankins contends that he was ineffectively represented by counsel and that as a federal officer, he was immune from state prosecution. The motion was denied. We reverse because the court erred in denying

Hankins a hearing on his claim of ineffectiveness of counsel.

The district court judge stated that he would not rule on the claim of ineffective assistance of counsel "because I feel that any consideration of the issue of ineffective aid of counsel should be raised on appeal." The district court cited no authority for this proposition. While it is quite true that this issue may be raised on a direct appeal from a judgment of conviction, this court has pointed out that "[t]he customary procedure for challenging effectiveness of defense counsel is by collateral attack on the conviction under 28 U.S.C. § 2255." United States v. Birges, 723 F.2d 666, 670 (9th Cir.), cert. denied, 104 S. Ct. 1926 (1984). The reason that collateral review is an appropriate means for a review of

ineffectiveness of counsel is that the errors and omissions of incompetent counsel may not appear on the record on direct appeal. Id. In the matter before us, Hankins' trial counsel failed to assert immunity as a defense nor did he insist that this issue be tried before the jury. The record is silent concerning the reasons, if any, which counsel caused to conclude that the defense of immunity should not be presented on behalf of his client. An evidentiary hearing on this issue will enable Hankins' new attorney to attempt to make a record showing that counsel's errors and omissions were caused by his incompetency and were prejudicial.

B. Federal Immunity

The district court concluded that Hankins had failed to establish as a matter of law that, as a federal officer,

he was entitled to immunity from state prosecution. The district court refused to conduct any evidentiary hearing on this issue. Instead the court apparently relied upon the facts presented to the jury. Because Hankins' trial counsel did not present evidence, request instructions, or argue to the jury that his client was entitled to federal immunity, we cannot determine from the record before us whether all the evidence necessary for the determination of this issue was presented to the jury.

In the absence of exceptional circumstances justifying the issuance of a writ of habeas corpus to bar prosecution in a state court, whether a federal officer is immune from prosecution because he was acting in the lawful performance of his duties is a defense that must be deter-

mined by the same court that decides the guilt or innocence of the accused. United States ex rel. Drury v. Lewis, 200 U.S. 1, 8 (1906). In Drury, the Supreme Court stated that where the issue of whether the federal officer was acting lawfully is "the gist of the case," it is a matter of defense. Id, at 8. In Clifton v. Cox, 549 F.d 722 (9th Cir. 1977), we interpreted Drury as holding that the defense of federal immunity "was a question of fact for the jury." Id. at 725 n.4. In Clifton, we affirmed the district court's order granting the petitioner's petition for a writ of habeas corpus discharging him from state custody and permanently staying all pending state court proceedings. Thus, a federal officer facing state prosecution may choose to raise the defense of immunity in a federal

district court prior to trial in a petition for a writ of habeas corpus under Clifton v. Cox, or he may elect to present this defense to the jury which must decide his guilt or innocence under Drury. If an accused federal officer elects to seek a permanent stay of pending criminal proceedings before trial, on the basis that he is immune from state prosecution, he bears the burden of persuasion. If he chooses, instead, to assert immunity as a defense at trial, the state must convince the jury beyond a reasonable doubt that the accused was not acting in the line of duty when the alleged crime was committed. Thus, the choice of remedies is a weighty strategic or tactical decision for defense counsel.

Hankins' trial counsel failed to present the defense of immunity to the

trial court as a pretrial bar to his prosecution or before the jury in order to raise a reasonable doubt of his guilt because he acted in the lawful performance of his duties. Defense counsel's conduct of the trial denied to Hankins trial by jury on a fundamental defense to the charges against him.

Because the district court refused to consider Hankins' claim, we cannot determine whether the failure to assert this defense was caused by attorney incompetence or if it was a deliberate tactical decision which misfired. We are also unable to determine on this record whether counsel's conduct, if incompetent, was also prejudicial. The district court erred in failing to consider Hankins' claim of incompetence of counsel. Under the circumstances of this case, it was

also error for the district court to determine the merits of Hankins' claim that he was immune from prosecution in a 2255 proceeding. Hankins was entitled, at his option, to have the issue tried by the jury which determined the issues raised by his plea of not guilty. We cannot tell from the present record whether the silent waiver of this defense at trial was a deliberate choice or the result of an error by incompetent trial counsel.

CONCLUSION

Hankins has failed to demonstrate any error in his appeal from the judgment of conviction. The district court erred, however, in denying Hankins' motion to vacate his sentence pursuant to section 2255.

The judgment in No. 83-5061 is affirmed.

The order denying the motion to vacate the sentence pursuant to section 2255 is reversed. We remand for an evidentiary hearing on the issue of competency of counsel and the prejudicial effect, if any, of the failure to present the defense of immunity prior to trial or before the jury which determined his guilt.

The order in No. 84-6255 is reversed.

FOOTNOTE

[1] Cal. Penal Code § 801 was revised in 1984. Cal. Penal Code § 802 continues the substance of former Section 801 and is equally applicable to misdemeanors.

The Court: Well, your papers raise that as a matter that should have been handled as a pretrial issue, and as I understand you to say that you felt that the facts of the case, a judge hearing that as a pretrial matter, would have resulted in no trial at all.

I certainly, in retrospect after now having heard all the evidence in this case, could give you no assurance that had it been raised as a pretrial matter, that I would have felt that the reasonableness of this man's conduct would have entitled him to the immunity that that defense would bring.

I would have had to take into consideration the facts, as I later and now understand them to be, of this defendant barrelling down a freeway in the effort to pull over an automobile that he

felt was carrying illegal aliens, and as a passenger in that car he has his gun drawn, well knowing from an earlier experience and from the admonition of a superior officer that he had no business doing that, and he actually fired that gun and fired it in such a manner as to let it go through the windshield of the automobile that had a driver and several passengers in it.

In my opinion there is no way that I would have felt that that type of conduct would have entitled him to a federal immunity defense.

Had the lawyer brought it up as a trial defense, I certainly -- Well, my first feeling that in fact it was done. All of the matters that you call to my attention having to do with reasonableness of behavior, reasonableness of conduct,

good faith belief in what he had a right to do -- all of those things were actually tried before this jury and decided against this defendant.

Let's talk about competence of counsel a little bit. I have the opinion from both hearing this lawyer, Mr. O'Neill, today concerning his experience as a trial lawyer and having a recollection of his conduct at the trial of this case that no one can say in good faith that he was not a competent lawyer.

Mr. Hankins says that there was no discussion about the existence of the federal immunity defense, but that seems to fall in the face of his later statement on the witness stand here today that that very same thing was talked about, although they didn't put a label on it. I don't know that a lawyer has to put a label on

something in order to discuss the elements of such a defense with his client.

This lawyer, in my opinion and in his own opinion, made a tactical choice in how he was going to defend this defendant, and he brought out all of his guns, and in my opinion did everything that a competent lawyer ought to do under the facts of this case in order to try to convince a jury that this man did not wantonly brandish a gun to the danger of other persons, and I remember the facts of this case, and I came away from it feeling that this man had no business in law enforcement if his conduct was going to be such as it was in this case, and I cannot say to you that in my opinion the giving of a label by Mr. O'Neill to this federal immunity defense and calling it such and bringing it up in any more vivid manner than it was resorted

to would have brought about any greater likelihood of another result in this case.

I have to deny the motion. The district attorney will prepare appropriate findings.

We are in recess.

(Proceeding concluded.)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	NOS. CV83-3613-DWW CR82-967-DWW
Plaintiff-Respondent,	FINDINGS OF FACTS AND CONCLUSIONS OF LAW
vs.	
DAVID R. HANKINS,	
Defendant-Petitioner,	

FINDINGS OF FACT

1. Defendant David R. Hankins retained William O'Neil III as defense counsel in the case of People v. Hankins, NO. CR 82-967-DWW. Although O'Neill had

not previously appeared as defense counsel in federal court, he was an experienced defense counsel in state court having tried approximated thirty (30) cases.

2. O'Neill researched the state's authority to prosecute the defendant for actions taken in the course of the defendant's duties as a Border Patrol Agent. In this research, O'Neil discovered the case of In re Neagle, 135 U.S. 1 (1980), in which the Supreme Court announced that federal officers are immune from state prosecution for actions taken within the scope of their duties.

3. O'Neill now cannot recall whether he and the defendant discussed O'Neill's research on the federal immunity defense, but O'Neill and the defendant discussed that state officers were immune from

prosecution for actions taken in the course of their duties.

4. O'Neill knew from his research that a petition for writ of habeas corpus could be filed, on the basis of the federal immunity defense, in federal court to attempt to prevent the defendant's trial. However, O'Neill concluded that the federal district court would not rant the petition but rather would want the jury to decide the primarily factual issue of whether the federal immunity defense applied. Since the defendant, due to financial reasons, had instructed O'Neill to pursue only those matters with a high likelihood of success, O'Neill did not file a pre-trial petition for writ of habeas corpus raising the federal immunity defense.

5. O'Neill and the defendant discussed and agreed that at trial that they would present the defense that the defendant could not be convicted for actions taken in the scope of his duties and that the defendant's conduct had been reasonable.

6. O'Neill and the defendant agreed to rely on the Border Patrol Handbook and to point out that the applicable provisions were contradictory in arguing that the defendant's actions were reasonable and within the scope of his duties.

7. At trial, O'Neill vigorously presentend the defense that the defendant had acted reasonably and that the defendant's actions were within the scope of his duties.

8. Despite O'Neill's vigorous defense, the evidence at trial demon-

strated conclusively and beyond any reasonable doubt that the defendant's actions were not within the scope of his duties and that the defendant did not honestly nor reasonably believe that his actions were necessary and proper in carrying out his duties as a Border Patrol Agent.

9. The defendant's actions were outside the scope of his duties. The Border Patrol Handbook provides that firearms are to be employed only in self-defense or in defense of another. (Handbook, ch. 17 p.11; ch. 24, p.22). Indeed, the Handbook specifically provides:

> Shooting other than in defense of himself, another officer, or an innocent third party is not within the scope of an officer's duties. Violation of this rule may result in the

> officer's being adjudged to be personally responsible in criminal and/or civil actions for any injuries or damages inflicted.

(Id. at ch. 24, p. 6-1). The Handbook states that a weapon is never to be pointed unless the agent intends to shoot (Id., ch. 24, p. 3). Warning shots also are specifically prohibited. (Id., ch. 24, p. 22).

10. Defendant on June 8, 1982, was a passenger in a Border Patrol vehicle, driven by his supervisor Neil Jensen, on the Ventura freeway pursuing, at a high rate of speed in rush hour traffic, a vehicle containing suspected illegal aliens. As the pursued vehicle was slowing and pulling to the side of the freeway, the defendant without justification drew his pistol, cocked it, pointed

the pistol in the direction of the driver of the pursued vehicle, and fired the pistol.

11. Defendant intended to shoot, as shown by: his cocking the pistol; his overzealousness in using a firearm to stop the pursued vehicle on June 8, 1982; and his nearly identical conduct under nearly idential circumstances in October 1981.

12. After that incident in October 1981, defendant's supervisor, Neil Jensen, rebuked the defendant and reminded him that:

> I (Jensen) had better never hear of anything such as this thing again, that it would not be justified in however -- I brought up the three instances when it would be authorized for us to use a handgun or a weapon. . . . In self-defense, defense of a

fellow officer, or defense of an innocent third party.

(R.T. 100-02).

13. Accordingly, defendant on June 8, 1982, violated the provisions of the Handbook by drawing his pistol (ch. 17, p. 11), pointing his pistol at the vehicle and/or the driver being pursued (ch. 24, p. 3), and shooting his pistol (ch. 17, p. 11, ch. 24, p. 22). In committing these acts, the defendant was acting outside the scope of his duties.

14. In committing the acts on June 8, 1982 set forth in paragraphs 10, 11 and 13 above, the defendant was not acting in the honest belief that his acts were necessary and proper in the performance of his duties. The driver of the pursued vehicle was suspected only of: the felony offenses of transporting illegal aliens

and resisting arrest; and the misdemeanor offense of being an illegal alien. These nonviolent offenses did not justify the defendant's use of his pistol, which posed a substantial danger not only to the driver of the pursued vehicle, but also the passengers in the pursued vehicle and all motorists in the vicinity.

CONCLUSIONS OF LAW

16. There is a strong presumption that O'Neill's tactical choice not to raise the federal immunity defense before trial or at trial "falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 104 S. Ct. 2052,

2066 (1984) (citation omitted). As the Court emphasized in Strickland:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id., at 2065 (citation omitted).

17. This court would not have granted a pre-trial petition for writ of habeas corpus raising the federal immunity defense. Since the defendant had instructed O'Neill to pursue only those matters with a high likelihood of success,

O'Neill was acting within the wide range of competence in deciding not to raise the federal immunity defense in a pre-trial petition for writ of habeas corpus.

18. At trial, O'Neill raised the essence of the federal immunity defense. He presented evidence and argued that the defendant was not guilty of the offense of brandishing a firearm in that: the defendant's conduct was authorized by the Handbook and the defendant had acted reasonably.

19. The essence of the federal immunity defense was provided in instructions to the jury. The jury was instructed on self-defense and defense of others and advised that these defenses applied if the defendant honestly and reasonably believed he was confronted with the danger of bodily injury to himself or

others. (R.T. 288-89). The jury was further instructed that the defendant could be convicted only if he was acting improperly and the force used was not justified. (R.T. 287).

20. Assuming that O'Neill rendered ineffective assistance of counsel by not raising the federal immunity defense before or at trial, the defendant is not entitled to a reversal of his conviction unless he shows "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 104 S. Ct. at 2068. The defendant must show that his conviction "resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 2064.

21. The defendant suffered no prejudice from O'Neill's decision not to raise the federal immunity defense before trial. The defendant raised that defense in his post-trial motion to vacate his conviction and the motion was denied. If the defense had been raised before trial, the court also would have denied the petition.

22. There is not a reasonable probability that a reasonable doubt would have been created if the federal immunity defense had been presented at trial. The federal immunity defense would have required that: (1) the defendant's act of brandishing a firearm was within the scope of his duties, that is, brandishing a firearm bore some reasonable relation to and connection with his duties and responsibilities; and (2) that he honestly and

reasonably believed that brandishing his gun was necessary and proper in performing his duties and responsibilities. Clifton v. Cox, 549 F.2d 726, 728-29 (9th Cir. 1977).

23. "The issue of [the defendant's] scope of authority presents a question of law . . . ." Clifton, 549 F.2d at 726. The defendant's action in brandishing his pistol on June 8, 1982, as a matter of law, was outside the scope of his duties. He therefore, was not entitled to a jury instruction on the federal immunity defense. Accordingly, O'Neill's failure - if he did fail - to present the federal immunity defense at trial was not prejudicial.

24. There is an additional reason why there was no prejudice from O'Neill's failure to raise the immunity defense at

trial. Under the federal immunity defense, the state would have had to prove beyond a reasonable doubt that the defendant lacked an honest or reasonable belief that his actions were necessary and proper in the performance of his duties. In this case, there is no reasoanble probability that the jury would have had a reasonable doubt that defendant did not have a reasonable or honest belief that his actions were necessary and proper in the performance of his duties. The defendant's actions were clearly in violations of the provisions of the Handbook. He had been previously rebuked by his supervisor for nearly identical conduct. He was not acting in self-defense or in defense of others. Last, the use of a pistol was grossly disproportionate to the offenses of which the driver was

suspected, and the use of a pistol unnecessarily endangered the lives of the passengers in the pursued vehicle and nearby motorists.

DATED: This _____ day of January, 1986.

DAVID W. WILLIAMS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA,	No. 86-5718
Plaintiff-Appellee,	D.C. No. CV 83-3613-DWW-2 and CR 82-967
vs.	
DAVID R. HANKINS,	**MEMORANDUM***
Defendant-Appellant.	

On Appeal from the Central District of California
Hon. David W. Williams, District Judge, Presiding

Argued and Submitted
January 5, 1987 -- Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

Before: **WALLACE, WIGGINS** and **KOZINSKI**, Circuit Judges.

The district court found that: (1) Hankins' "lawyer . . . made a tactical choice" in failing to raise the immunity defense at trial; and (2) Hankins was not prejudiced because raising the defense " would [not] have brought about any greater likelihood of another result in this case." These findings are supported by the record. Therefore, Hankins' claim of ineffective assistance of counsel was properly denied. See Strickland v. Washington, 466 U.S. 668, 687-38 (1984).

AFFIRMED.

ARTICLE VI.--MISCELLANEOUS PROVISIONS

Clause 2. Supreme Law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 14, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

United States Court of
Appeals for the
Ninth Circuit
P.O. Box 547
San Francisco, California 94101

Hon. David W. Williams
United States District Judge
312 North Spring Street
Los Angeles, California 90012

Richard Romero
Deputy District Attorney
Ventura County District Attorney
312 North Spring Street
Los Angeles, California 90012

John Van De Kamp
Attorney General of the
State of California
3810 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

No. 86-1508

In the Supreme Court of the United States

October Term, 1986

DAVID HANKINS,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal law enforcement officer, such as petitioner, is entitled to immunity from state prosecution for a crime committed while acting in his official capacity, if his conduct was not objectively reasonable.

2. Whether petitioner's trial counsel rendered effective assistance of counsel in his presentation of a modified form of the "federal immunity" defense.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 86-1508

In the Supreme Court of the United States

October Term, 1986

DAVID HANKINS,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A19-A39 and A56-A57) and of the district court (A1-A18 and A40-A55) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1987. The petition for writ of certiorari was filed on March 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of brandishing a firearm, a misdemeanor, in violation of Section 417(a) of the California Penal Code. His case had been removed from state court to federal court pursuant to his motion under 28 U.S.C. § 1441(a)(1), which authorizes such a removal if a defendant may raise a defense based on his official duties as a federal officer. Petitioner was sentenced to serve six months in the county jail, with the execution of all but thirty days suspended, and was placed on probation for one year.

Petitioner appealed his conviction and, at the same time, he filed in the district court a motion to vacate his conviction pursuant to 28 U.S.C. § 2255. That motion was denied without a hearing, and petitioner appealed. The court of appeals affirmed the conviction, but vacated the denial of the § 2255 motion and ordered a hearing on: the competency of petitioner's trial counsel; and the prejudice, if any, of petitioner's trial counsel's failure to present a defense based on "federal immunity." The hearing was held and the district court concluded that petitioner's trial counsel had presented, in effect, a federal immunity defense and that, assuming for the sake of argument, that the federal immunity defense was not presented, there was no prejudice. The court of appeals affirmed.

The evidence showed that on June 8, 1982, petitioner, while acting as a United States Border Patrol Agent, was a passenger in a Border Patrol vehicle in pursuit of a Ford automobile containing individuals suspected of being aliens unlawfully in the United States. (R.T.

103).[1] The pursuit occurred on a major freeway in morning rush-hour traffic. (R.T. 103-04, 125, 138). As the Border Patrol vehicle approached the left side of the Ford, petitioner pulled out his revolver, cocked it, pointed at the Ford and fired one round which shattered the driver's window. (R.T. 107-08, 139, 207). The driver of the Ford was struck by the shattered glass, but was not injured otherwise. (R.T. 126, 141). The driver then stopped the Ford on the side of the freeway. (R.T. 140-41).

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[1] "R.T." refers to the Reporter's Transcript of petitioner's trial.

ARGUMENT

1. Petitioner, who asserts that his trial counsel did not rely on the so-called "federal immunity" defense (Pet. 15-16), nevertheless contends that the Court of Appeals for the Ninth Circuit in *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977), has unduly restricted that defense by requiring that the federal officer's conduct be "objectively reasonable." Petitioner is foreclosed from raising this contention since he failed to present it to the court of appeals or the district court. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955). In any event, the Ninth Circuit, along with the other courts which have ruled on the issue, properly have limited federal immunity to those officers whose conduct was objectively reasonable.

It is well settled that, under the Supremacy Clause (Article VI) of the U.S. Constitution, a federal officer is not subject to state prosecution for acts which are committed in the performance of his duties and which are necessary and proper to the performance of those duties. *In re Neagle*, 135 U.S. 1, 75-76 (1890). In *Clifton v. Cox*, 549 F.2d at 728, the Ninth Circuit held that the determination of whether an officer's actions were necessary and proper "must rest not only on the subjective belief of the officer but also on the objective finding that his conduct may be said to be reasonable under the existing circumstances." Other courts previously had held that, to be immune from prosecution, the officer must honestly and reasonably believe that his actions were necessary and proper. *Castle v. Lewis*, 254 F. 917, 921 (8th Cir. 1918); *In re McShane*, 235 F. Supp. 262, 274 (N.D. Miss. 1964); *Brown v. Cain*, 56 F. Supp. 56, 58 (E.D. Pa. 1944). Subsequent to the Ninth Circuit's decision in *Clifton v. Cox*, courts have continued to hold that the federal immunity defense

requires that the officer honestly and reasonably believe his actions were necessary and proper. *Commonwealth v. Long*, 637 F. Supp. 1150, 1152 (W.D. Ky. 1986); *State v. Marra*, 528 F. Supp. 381, 387 (D. Conn. 1981). Therefore, the lower courts unanimously have applied an "objective reasonableness" standard to the federal immunity defense, by requiring that the officer reasonably believe his actions were necessary and proper.

Petitioner speciously argues that the "objective reasonableness" test departs from "the traditional criminal intent/wantonless standard and establishe[s] a rule that imposes criminal liability based upon an ordinary negligence standard." (Pet. 12). However, the "objective reasonableness" test is not such a departure. Indeed, it has long been a material element of the principle of self-defense. That is, to establish self-defense, a defendant must have had reasonable grounds to believe that he was in imminent danger. *See Brown v. United States*, 256 U.S. 335, 343 (1921); 2 Devitt & Blackmar, *Federal Jury Practice and Instructions*, §§ 41.19 and 41.20 (3d ed. 1977).

Moreover, the "objective reasonableness" test does not create criminal liability for federal officers based on negligent conduct. If a federal officer acts "negligently" by using bad judgment, he nevertheless will be immune from state prosecution so long as he reasonably believed his actions were necessary and proper. See *In re McShane*, 235 F. Supp. at 274.

For example, in *Commonwealth v. Long*, 637 F. Supp. at 1152, the defendant, a Special Agent with the Federal Bureau of Investigation (FBI), failed to obtain the necessary approval of a superior to authorize an informant to participate in a burglary as part of an undercover investigation. Although the defendant was

reprimanded and given administrative punishment by the FBI for his failure to follow FBI guidelines, the defendant was immune from state prosecution for his participation in the "burglary" because he reasonably believed his actions were necessary and proper. *Id.* "[I]f the conduct is necessary and proper and part of the agent's authorized duties, even when he uses poor judgment, he is protected by the Supremacy Clause of the Constitution." *Id.*

2. Petitioner, as stated above, also contends that his trial counsel was ineffective in not raising the federal immunity defense. (Pet. 15-16). This claim is insubstantial.

As found by the district court below at the § 2255 hearing, petitioner's trial counsel presented the essence of the federal immunity defense:

> Had the lawyer brought it up as a trial defense, I certainly — well, my first feeling that in fact it was done. All of the matters that you call to my attention having to do with reasonableness of behavior, reasonableness of conduct, good faith belief in what he had a right to do — all of those things were actually tried before this jury and decided against this defendant.

(Hg T. 42-43).[2] Under the federal immunity defense, petitioner would not be subject to prosecution if he used reasonable force in stopping the Ford. (R.T. 239). The testimony elicited by petitioner's trial counsel, together with the district court's instructions and trial counsel's argument, focused on whether petitioner's use of the

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[2]"Hg T." refers to the transcript of petitioner's § 2255 hearing.

revolver was reasonable. (R.T. 240, 264, 266-67, 269-71, 286-87). Under the federal immunity defense, petitioner could not be prosecuted for conduct which was authorized by the U.S. Border Patrol. Petitioner testified and trial counsel argued that his conduct was authorized, and the jury was instructed that they had to determine whether petitioner's conduct was proper, that is, authorized. (R.T. 239, 264, 266-67, 287). Lastly, under the federal immunity defense, petitioner could not be convicted if he was acting in self-defense or in defense of others. (T. Ex. 1, p. 17-11).[3] Petitioner's testimony, trial counsel's argument and the court's instructions all addressed that issue. (R.T. 215, 238, 240, 287-89).

Even assuming, for the sake of argument, that petitioner's trial counsel did not present the essence of the federal immunity defense and therefore was ineffective, nevertheless petitioner was not prejudiced by that omission and is not entitled to any relief. If a defense counsel is ineffective, a defendant, to obtain relief, "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). There is no reasonable proability that the result of the proceeding below would have been different if trial counsel had presented petitioner's defense explicitly as a federal immunity defense. As noted by the district court below:

> This lawyer, in my opinion and in his own opinion, made a tactical choice in how he was going to defend this defendant, and he brought out all of his guns, and in my opinion did everything that a competent lawyer ought to

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[3]"T. Ex." refers to the indicated trial exhibit.

> do under the facts of this case in order to try to convince a jury that this man did not wantonly brandish a gun to the danger of other persons, and I remember the facts of this case, and I came away from it feeling that this man had no business in law enforcement if his conduct was going to be such as it was in this case, and I cannot say to you that in my opinion the giving of a label by [petitioner's trial counsel] to this federal immunity defense and calling it such and bringing it up in any more vivid manner than it was resorted to would have brought about any greater likelihood of another result in this case.

(Hg T. 43-44).

The record shows, as found by the district court, that petitioner was not entitled to federal immunity. (Hg T. 42). In particular, the record shows that petitioner did not honestly or reasonably believe that his use of a firearm to stop the fleeing Ford automobile was necessary and proper. The only offense which the Ford's passengers were suspected of was the misdemeanor offense of being aliens unlawfully within the United States.[4] (R.T. 224). The driver of the Ford was suspected only of the felony offense of transporting undocumented aliens[5] and the misdemeanor offense of being an undocumented alien in the United States. (R.T. 224-25). Yet, petitioner, by cocking his pistol and pointing in the direction of the Ford, endangered its occupants. (R.T. 223). Petitioner's use of deadly force to apprehend the occupants of the Ford was patently excessive and

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[4] In violation of 8 U.S.C. § 1325.

[5] In violation of 8 U.S.C. § 1324(a)(2).

unreasonable. *See Garner v. Memphis*, 105 S. Ct. 1694 (1985) (deadly force unreasonable in apprehending burglary suspect).

Petitioner's use of a gun to stop the Ford was against proper police procedure (R.T. 149-51) and violated Border Patrol policy. (T. Ex. 1, pp. 17-11, 24-3, 24-22, R.T. 100-02). Moreover, petitioner knew that such use of a gun was not authorized, in that he had been warned approximately eight months before in a similar incident that he could not use his gun to stop a fleeing vehicle. (R.T. 100-01). Under these circumstances, petitioner was not prejudiced by any failure of his trial counsel explicitly to raise the federal immunity defense.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 1, 1987, I served the within *Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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Washington, D.C. 20543
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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)